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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1945

No. 296

HUBERT C. REYNOLDS, suing on behalf of himself and others having common rights and interests,

Petitioner and
Appellant below,

vs.

BOARD OF PUBLIC INSTRUCTION for the County of Dade, State of Florida, and JAMES T. WILSON,

Respondents and
Appellees below.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

~~STATEMENT OF THE CASE~~

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STATEMENT OF THE CASE

The petitioner, Hubert C. Reynolds, a colored teacher in the public schools of Dade County, Florida, brought this suit on behalf of himself and other teachers and principals in the public schools of Dade County. The suit is a class action (R. 1 and 4-5) on behalf of the colored teachers and

principals employed in the Dade County public schools and seeks to obtain relief for colored teachers and principals *as a class or group* and not for the plaintiff, Hubert C. Reynolds or any other particular teacher or principal from an alleged policy, custom and usage of the defendants of paying higher salaries to white teachers and principals *as a class or group* than they pay to negro teachers or principals *as a group* solely because of the race or color of the colored teachers and principals.

The complaint (R. 1) was filed February 17, 1942, and alleged that the plaintiffs are colored persons, citizens and residents of Florida and are employed as teachers and principals in the public schools of Dade County and that notwithstanding the fact that they hold the same certificates issued by the State as are held by white teachers and that they perform the same services as are performed by the white teachers, yet the defendant Board of Public Instruction of Dade County pays the colored teachers and principals lower salaries than they pay its white teachers and principals solely because of the race or color of the colored teachers and principals contrary to the Fourteenth Amendment to the Constitution of the United States. The relief sought is a declaratory judgment and injunction (1) declaring that the policy, custom and usage by which the defendants pay lower salaries to the colored teachers and principals than they pay to white teachers and principals is based solely upon the race or color of the colored teachers and principals and that this is a violation of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States; (2) restraining the defendants from continuing the policy, custom and usage complained of and (3) awarding costs to the plaintiff.

On March 12, 1942, the defendants filed their answer (R. 6) in which they (1) denied the material allegations of

unlawful discrimination against plaintiffs and (2) alleged that the colored teachers *as a class or group* do not exercise the same duties or perform services substantially equivalent to those exercised and performed by the white teachers *as a class or group* and that the value of the services performed by the colored teachers as a class or group is substantially less than the value of the duties exercised and the services performed by the white teachers *as a class or group* with identical state certificates and with the same number of years of experience and (3) alleged that on November 26, 1941, the Board adopted a salary schedule to the end and for the purpose of fairly and accurately classifying all the instructional personnel of Dade County, and on April 29, 1942, the Board amended the salary schedule and that thereafter all teachers and principals colored as well as white, were rated thereunder and all salaries paid and to be paid are determined without discrimination as to race or color under the schedule as amended, in accordance with the policy of the Board to pay the instructional personnel, colored as well as white, salaries commensurate with their respective abilities and qualifications and services rendered without regard to race or color.

Thereafter seven additional defenses (R. 42) were filed but only additional defense No. 7 is material as no evidence was introduced on the remaining six additional defenses. The seventh additional defense (R. 49) was to the effect that all teachers and principals, colored as well as white, had been rated and their salaries were being paid under the schedule of November 26, 1941, as amended April 29, 1942, without discrimination as to race or color but solely upon the basis of their respective ability and qualifications and services performed pursuant to the terms of the schedule as amended and that the ratings had been completed since the filing of the original answer May 12, 1942. The new school year 1942-

1943 began on July 1, 1942, which was after the filing of the answer on May 12, 1942.

Thereafter on December 6, 1943 (R. 52) additional defense No. 8 was filed which in substance alleged: that on July 21, 1943, the Board further amended the salary schedule (R. 55) as a result of further careful study to the end of perfecting the classification of instructional personnel, colored as well as white and in order to accomplish fully the determined purpose of the defendants of fairly rating all teachers and principals and of fixing their salaries on the basis of services performed as well as their respective abilities and qualifications; that all teachers and principals, colored as well as white, in the Dade County public school system have been rated and were being and would continue to be rated and paid without respect to race or color solely upon the basis of their respective abilities and qualifications and services performed and rendered pursuant to the schedule as amended.

The case came on for trial on March 4, 1943, and on the following day at the request of plaintiff, it was postponed until June 21, 1943. The trial was resumed on June 23, and June 24, 1943 and at the request of plaintiff was again postponed. As shown by the record (R. 78) the trial was resumed December 6, 1943 and thereafter completed.

The issue tried by the District Judge may be stated as follows: Was the payment by the defendants to white teachers and principals, as a group, of higher salaries than those paid to colored teachers and principals, as a group, at the time of trial occasioned by arbitrary rating and classification, pursuant to a scheme on the part of the defendants to discriminate against the plaintiffs, on account of their race and color?

On March 11, 1944, the District Judge entered final judgment (R. 408) wherein the Court decreed: (1) that the custom, policy and usage now pursued by the defendants in the payment of salaries of teachers and principals does not constitute unlawful discrimination within the inhibition of the equal protection clause of the Fourteenth Amendment to the Constitution; (2) that the salary schedule presently in force is fair on its face and is being uniformly applied by the defendants to the teachers and principals of Dade County without discrimination against the colored teachers and principals; (3) a dismissal of the complaint because the plaintiffs failed to establish the allegations thereof and (4) award costs to the defendants.

The plaintiff took an appeal to the Circuit Court for the Fifth Circuit and on the 23rd day of April, 1945, that Court affirmed the judgment of the District Court (R. 43) which opinion is reported in 148 F. (2d) 754.

The petition for certiorari filed in this cause seeks to have this Court review the judgment of the Circuit Court of Appeals.

ARGUMENT

POINT A.

NO REASON IS SHOWN FOR THE ISSUANCE OF THE WRIT OF CERTIORARI

No effort has been made to set forth any specific reason for the issuance of a writ of certiorari. Instead counsel for petitioner have contented themselves with outlining, generally in nebulous form, some twelve points or statements which are claimed to have been overlooked by the Court.

A mere glance at the recital of these alleged derelictions of the lower courts (Petition pages 11-14) will disclose the utter impossibility of our replying to or discussing them in detail. It is self-evident that an effort so to do would necessarily result in a full brief of the cause. We are convinced that consideration of the detailed findings of the District Judge (R. 403), together with the affirming opinion (R. 425), will constitute a complete refutation of each of these so-called reasons.

As best we can determine, the actual contention advanced for the issuance of the writ is that the lower courts chose to consider that petitioner's prima facie case was rebutted solely by the general assertions of public officials as to the performance of their duties. The prima facie case claimed to have been made by the petitioner was that under the 1940 schedule, unconstitutional on its face, the colored teachers *as a group* were receiving substantially less salaries than were the white teachers *as a group* which difference existed at the time of the protest and at the time of trial.

Thus they contend the lower courts have failed to "understand the case and the evidence, its import and significance" (Pet. p. 13). They assert that the courts erroneously accepted mere generalities as constituting proof on behalf of defendant and thereby indulged in the "violent presumption" [1] that the admittedly lower salaries paid to the group composed of colored teachers did not violate their constitutional rights.

We fully appreciate that a conclusion may appropriately be drawn from the whole mass of evidence which is not always the ascertainment of the kind of fact that precludes consideration by this Honorable Court. And further, that the general rule of concurrence of findings of fact by the lower courts does not always relieve this Court of the task of examining the foundation for findings in a particular case. [2]

With this principle in mind, we will endeavor to ascertain whether the lower courts (1) failed to understand the issues and fundamental question presented or (2) understanding same, they either failed to grasp the nature of the evidence or erroneously accepted "mere generalities" and asservations as constituting proof. [3] In its essence, the overall question then is whether the nature of the material on which the finding was based was such as to warrant the ultimate judgment. [4]

This Court will, we believe, take judicial knowledge that the charges of evil purpose, wrong-doing and outright fraud-

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1. Neal vs. Delaware, 103 U.S. 370, 26 L. Ed. 567
2. Baumgartner vs. U.S., 322 U.S. 665, 88 L. Ed. 1525
3. Norris vs. Alabama, 294 U.S. 598, 79 L. Ed. 1081
4. Baumgartner case supra.

ulent and nefarious conduct set forth in the petition and accompanying brief are not here made for the first time. And further this Court will doubtless recognize it to be a fact that necessarily such has been the policy and trial strategy of opposing counsel from the inception of this litigation.

Thus we assert the courts below would have been unbelievably stupid had they not grasped fully the nature of the case and been zealous to examine the evidence to ascertain any indication of "an evil eye or uneven hand". But we need not rely on assumptions as to whether the courts were derelict in the performance of their duties, as reference to their opinions will disclose beyond any doubt that they had a full understanding of the importance and social significance of the issues presented.

The second question is then for determination. The answer thereto is, we believe, fully and satisfactorily contained in the findings of the District Court and the well considered affirming opinion of the Appellate Court. However, some additional observations may be here helpful.

The basis of the petitioner's claim is that the courts below failing to understand the question, misapplied the evidence and found (1) that petitioner's prima facie case had been overcome and (2) denied petitioner's contention that the fact-that the evidence disclosed that the colored teachers *as a group* were still receiving, at the time of trial, less compensation for their services than *the white group*,—did not of itself constitute a violation of the constitutional rights of the colored group.

This contention was not overlooked by either of the lower courts, but, on the contrary, was fully considered in the light

of all of the evidence. It was rejected by both courts. [5]

Assuming that the 1940 schedule (Plaintiff's Ex. 2), discriminatory on its face, was still in effect at the time this action was filed [6] and admitting that the evidence disclosed that the colored teachers were then receiving less compensation, *as a group,* than the white group, the plaintiff, with the assistance of a presumption, possibly had established a prima facie case. [7]

Had the defendants then not seen fit to go forward with the evidence or had they contented themselves with merely producing testimony limited solely to that of "general asser-

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5. Finding 13 of District Court was: "I find that the evidence as a whole does not warrant the inference that the differential in total compensation is ocasioned by racial discrimination, as the evidence clearly provides a reason for the aforesaid condition, and, in addition thereto, establishes that the classification, and rating given to the teachers and principals of both groups have been the result of conscientious performance by the Rating Committee of an admittedly difficult task". See opinion of Appellate Court, pages 756 and 757: "The new basis of individual classification resulted in the change in the salary of many individuals, both white and colored, though it remained true that as a group the white were rated higher than the colored as a group. * * * The trial judge saw and heard the witnesses testify, and believed them. We do, too".

6. This is indisputably incorrect, as it was abolished on Nov. 5, 1941.

7. This is doubtful. The outcome would turn on the effect and balancing of contrary presumptions, i.e. the continuance of a theretofore existing condition as opposed to the presumption that the Board, as public officials, had honestly performed their duty in effecting classifications of the individual teachers under the new and non-discriminatory schedule in effect when the action was filed. However, for the sake of argument, we are willing to concede the point, same being here immaterial.

tions of the performance of their official duties", possibly the petitioner might have been entitled to a decree of some nature. [8]

It is here to be borne in mind that plaintiff had based his right to a decree not merely upon the prior existence of a policy and custom of discrimination, but of its continuance. The issue was the existence of such policy and custom *as of the time of trial.* Admittedly, the burden rested upon the plaintiff to establish such fact and that burden did not shift but remained throughout the case. But the uncontroverted evidence established that the defendants had, long prior to the filing of the complaint, abolished the old schedule [9] which was the basis of plaintiff's petition and protest and had adopted a new and entirely different schedule. We here observe that throughout the proceedings in both lower courts, the plaintiff never claimed that the new schedule was discriminatory but it stood admitted as fair on its face.

The old policy and custom of compensating teachers—under the 1940 schedule—had ended, whatever it may have been, before this action was filed. The defendants fully and completely, by both written and verbal evidence, disclosed the nature of the new schedule and the machinery set up thereunder for rating and classifying teachers. They disclosed the various amendments which were adopted by the

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8. This is even more doubtful, for reasons that are self-evident.
9. The old (1940) schedule was abolished November 5, 1941 (Def. Ex. 3). The Board of Public Instruction had, however, for many months prior thereto, been working on a salary schedule that would measure the worth of the individual teacher (Def. Exhs. 1, 2 and R. 41). The new schedule was adopted November 26, 1941 (Pl. Exh. 4) and the action was filed on February 17, 1942 (R. 1).

Board to the end of more perfectly measuring the teacher worth and effectiveness of each individual teacher.

Further, the defendants produced three members of the rating committee, whose professional attainments, qualifications and integrity have never been questioned, who outlined step by step the actual process followed by the committee in rating each teacher, white and colored (R. 131-402). Proof was also adduced establishing the classification of all teachers, white and colored, which resulted from the rating (Plaintiffs' Ex. 1). The salary paid to each teacher resulting from the classification under the schedule was established. Defendants' testimony, apart from their voluminous exhibits comprised approximately 288 pages of the printed record.

Defendants' full records reflecting each step taken in the protracted rating process were always available to the plaintiff. In fact his attorney, Mr. Hyde, had checked and inspected the records appertaining to ratings and payment of salaries many months prior to the trial (R. 86).

The defendants, though not required so to do by any rule, voluntarily prepared a compilation, comprising some 67 pages, wherein was set forth all of the results of the ratings. This was delivered to the plaintiff and constituted his Exhibit 1.

All of the records were present in court and available to plaintiff during each of the three different times the cause came on for trial, i.e., March 4, 1943, June 23, 1943, and December 6, 1943. Here we may observe that on each of the first two occasions the trial was halted at the request of the plaintiff.

In addition, plaintiff's counsel had taken the depositions of Supt. Wilson and Mr. Conroy—both members of the rating committee—long prior to trial (Plaintiff's Ex. 3).

Thus it is seen that the plaintiff had every opportunity to fully prepare his case, being advised in detail of the nature of defendant's evidence. He knew both by the testimony of the witnesses, as well as from the records, that the colored teachers *as a group* were still receiving lower salaries than *the white group*. There has never been any contention to the contrary. Plaintiff's counsel well knew, long prior to the final trial date, that the defendants earnestly contended and insisted that this difference in salaries of the two groups resulted solely from the honest and conscientious application of the salary schedule, the bona fide admeasurement of individual teacher worth, white and colored. This was established as a fact not only by the testimony of the witnesses, but likewise by the records themselves, [10] all statements of the opposing counsel to the contrary notwithstanding (R. 274-399, 168, 211, 308, 137-139, 141-142, and Plaintiff's Ex. 1 and Defendant's Exs. 1-13).

Assuredly, when the defendants rested, it was incumbent upon plaintiff, if he were to prevail, to carry the burden resting on him of establishing his case. He made no effort so to do. In fact he introduced not one word of evidence of any nature (R. 403). He was content then, as he has been at all subsequent times, to rely upon charges of bad faith and evil motive of the public officials in whose hands the administration of the schedule had been placed. This, plus the repeated insistence that he was entitled to a decree because it was admitted by the defendants that the white teachers *as*

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10. See Appendix for digest of the evidence supporting the above assertion.

a group were still receiving an overall greater amount in salaries than *the colored group.*

It is here to be importantly noted that no single colored teacher, not even the plaintiff himself, testified that his classification and rating was incorrect or that the salary paid him was less than he was entitled to. Nor is that all in this regard. The schedule specifically provided (Def. Ex. 11, p. 5) the right of appeal of any teacher who was dissatisfied with his or her rating. If requested, the Board was required to promptly make, at its own expense, an examination available to the teacher under stated impartial supervision. The result of this examination would finally determine the salary to be paid. The record disclosed that not one teacher expressed dissatisfaction.

We sincerely believe that the Appendix hereto attached, wherein a brief digest of certain pertinent portions of the evidence is set forth, will fully refute the impression which the petitioner has sought to create—that the colored teachers and principals have been deprived of their constitutional rights by a deliberate and cleverly designed fraud perpetrated by the defendant Board, the Superintendent of Public Instruction and the professional staff upon whom was placed the onerous task of rating each of the approximately 1500 teachers and principals constituting the instructional personnel of Dade County.

POINT B.

THE RECORD COMPLETELY REFUTES THE CONTENTIONS MADE IN PETITIONER'S BRIEF AS TO THE EXISTENCE OF DISCRIMINATION

We here wish to make it clear that at no time during the instant litigation has any contention been advanced or effort made to deprive petitioner, or the class represented by him, of their rights under the equal protection clause of the Fourteenth Amendment. The Board of Public Instruction of Dade County, Supt. Wilson and every official who has participated in the machinery, whereby the salaries paid to the instructional personnel of the aforesaid county have been determined under the new schedule, entered upon and performed their official duties with the sincere conviction that the colored teachers are entitled to have their compensation determined and fixed without discrimination on account of race or color.

It is true that the above statement is a general assertion on our part and one which it may be said would naturally be expected. But notwithstanding this, we feel impelled to challenge the unfounded and vicious—we use the word advisedly—attack here again made upon the character and honesty of purpose of the defendants.

We have made a like assertion—as set forth in the first paragraph above—in each of the courts below and have specifically requested that its complete correctness be checked by the record. We here make the same request with absolute confidence of like result. The utter unsoundness of the attack made upon the defendants is, we believe, definitely

indicated by the fact that petitioner has, by indirection, leveled like charges against the Courts below. [11]

Before proceeding further, we also wish to make it clear that we did not raise the question of the existence, vel non, of an actual controversy in either of the courts below. This, notwithstanding we were fully cognizant of the probable absence of basis for the declaration sought by petitioner as is inferentially pointed out by the Circuit Court of Appeals. [12] We, as counsel, as well as the defendants, have been desirous of a full adjudication as to the merits of the November, 1941 schedule adopted by the Board and subsequently amended, and of the ratings and classifications pursuant thereto. At no time has there been a desire to terminate this litigation through a technical device.

Petitioner contends this Court should assume jurisdiction because the courts below overlooked evidence which established unconstitutional discrimination against the colored

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11. (Pet. Br. 17): "The records are full of coincidences - - - which should have convinced the court. - - All of these the Court either disregarded or simply overlooked". At page 19, after quoting from the opinion, the following statement is made: "That is an inaccurate statement. - - - As a matter of fact, it is contrary to the record". At page 22: "We are amazed that this proposition - - was given any weight by the Circuit Court of Appeals". At pages 22 and 23, after quoting from the opinion, the statement is made, "That is, indeed a strange observation". And see page 24. In the petition (ground i, p. 12), it is said the court "in its decision evidenced only a fragmentary knowledge and understanding of the case". Also see ground j. And it is stated (K- p. 13) that the lower courts "in the face of the record - - - fully indicated their willingness to believe the white witnesses - - in preference to the figures presented by petitioner's evidence".

12. Record, pages 426 and 427.

teachers as a group. In his brief he relies upon the following propositions: (1) the method of rating was unfair to the colored teachers (Br. 7, 8); (2) the item of cultural background on the rating scale favored the whites (Br. 8); (3) that the principals took no part in the rating (Br. 8, 9); (4) the rating committee was all white (Br. 9, 10); (5) that the actual rating of the teachers was a mere sham (Br. 10-23); (6) the additional defenses showed that the defendants were prejudiced against the colored teachers and principals (Br. 23-26).

Items (1) and (2) are in fact a belated claim, here first made, that the new schedule was discriminatory on its face. We submit the schedule itself constitutes a sufficient refutation of these positions (Plaintiff's Ex. 5 and Defendant's Ex. 11). But in addition, the record contains the testimony of three educators (R. 131-133, 205-207, 274-276) that the schedule constituted a sound professional measuring instrument to determine the worth and effectiveness of the individual teacher (R. 129, 144, 236, 237). This testimony was not controverted. Further, the determination of the provisions of the schedule necessitated the defendant Board to exercise its judgment and discretion. Courts will refuse to substitute their judgment for that of officials entrusted by the law with its execution. State of Louisiana vs. McAdoo, 234 U.S. 627, 34 S. Ct. 929, 58 L. Ed. 1506.

Items (3) and (4) are a claim that the lower courts erroneously approved discriminatory machinery for the application of the schedule. But here again no evidence whatsoever was brought forward by petitioner. When analyzed these propositions amount to a mere contention that possibly a different result might have eventuated had principals and colored teachers served as members of the rating committee. Why such result would have been occasioned is not disclosed

by the evidence. In its essence petitioner's contention is that the Federal Court should have taken over the modus operandi of the rating process but it is settled that any interference on the part of the Federal authorities with the management of schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land. Cumming vs. County Board of Education, 175 U.S. 528, 44 L. Ed. 262.

In item (5) it is claimed that the record should have convinced the courts below "that the defendants were simply going through motions of rating and grading to give a superficial appearance of compliance with constitutional mandates, while actually meaning to, and actually defeating them" (Pet. Br. 17).

This is a direct charge that the defendants deliberately and designedly violated the high trust imposed upon them in the performance of their official duties.

Assuming the testimony of these officials, as to the sincerity of their purpose in effectuating the schedule, (R. 134, 135, 143, 165, 207, 221, 281, 282, 288, 308) amounts, as petitioner argues, to mere general assertions of their per-

formance of duty, are the findings of the lower courts on this point erroneous? [13]

As petitioner claimed the defendants, in the administration of the schedule, deliberately discriminated against the colored group, it was incumbent upon him to show "how or by what means" this was accomplished. Williams vs. State of Miss., 170 U.S. 213, 42 L. Ed. 1012. No effort was made by petitioner so to do. The good faith and integrity of purpose of both the Board and rating committee stand uncontroverted in the record. But opposing counsel, here as in the courts below, level charges of evil purpose and outright dishonest conduct against these officials. The nature of the charges made is such that, if they be true, then, necessarily Board Member Terry and the members of the rating committee were guilty of perjury in their testimony.

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13. The District Judge found:

"8. The said Rating Committee appears to the Court to have been reasonably competent and qualified, from a professional standpoint, to perform their duties as outlined and provided in the salary schedule, and it is further found as a fact that the Committee did approach their task in a conscientious and professional manner". (R. 405)

"11. I further find from the evidence that prior to the trial of this cause, each teacher and principal, both white and negro, was classified and rated and that this was done conscientiously on the basis of determining teacher value and worth under the terms of the schedule upon a written rating sheet, and without consideration to race or color of any teacher or principal, and that salaries are now being determined and paid on the classification and rating so done". (R. 405, 406).

"13. * * * the evidence clearly * * * establishes that the classification and rating given to teachers and principals have been the result of conscientious performance by the Rating Committee of an admittedly difficult task". (R. 406)

The Appellate Court said: "The Trial Judge saw and heard the witnesses testify, and believed them. We do, too".

However, no word of testimony was brought forward to sustain this imputation of perjury of defendants' witnesses. Under such circumstances, the complaint was for dismissal. Coulter vs. L. & N. R. Co., 196 U.S. 599, 49 L. Ed. 615.

But defendants' proof, in refutation of the claimed discriminatory policy and usage, did not rest merely upon verbal evidence, as petitioner would have this Court believe. The good faith application of the schedule is established by the results (R. 167, 168, 237, 238) and other strong corroborating evidence. [14] The assertions made by petitioner to the effect that no changes resulted from the application of the schedule are grossly inaccurate (R. 292-295, 312-324, 333, 342-346). The courts below had before them the full statistical data and compilations. Both courts disapproved the identical contentions here made by petitioner, as to the results of the application of the schedule. It is true that, on an average and *as a group*, the colored teachers were not receiving as high salaries as *the white group* at either the time of filing the suit or at the time of trial. This admitted fact is greatly stressed by petitioner as indicating, indeed necessitating, a finding of unconstitutional discrimination. The trial court found:

> "Although a compilation of the total salaries paid to the two groups shows that the overall salaries paid to the white group still exceeded the total of the salaries paid to the group composed of negro teachers and principals, I find that the evidence as a whole does not warrant the inference that the differential in total compensation is occasioned by racial discrimination, as the evidence clearly provides a reason for the aforesaid condition, and, in addition thereto, establishes that the classification and rating given to teachers and principals of both groups have been the result of conscientious perform-

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14. See Appendix hereto attached.

ance by the Rating Committee of an admittedly difficult task". (R. 406)

The Circuit Court of Appeals approved this finding. The testimony, not mere generalities, of many witnesses established the reasons for this continued disparity in salary levels (R. 136-139, 211, 308, 310). The soundness of these reasons was not challenged.

The Appellate Court pointed to evidence which strongly corroborated the fact that the difference in salary levels resulted only from a fair administration of the schedule, to-wit, that although the schedule provided the right of appeal to any teacher dissatisfied with his rating "not a single appeal to this disinterested arbiter has been taken". The impact of this fact upon petitioner's claim appears in Dent vs. St. of W. Va., 129 U.S. 114, 32 L. Ed. 623.

The claim is made by petitioner that the members of the rating committee were unfitted for their task by reason of racial prejudice. It is argued that this prejudice was evidenced by their professional opinion that the colored teachers *as a group* were not possessed of the same degree of teacher worth and value to the system as the white group. Indeed appellants go further and charge that the members of the committee approached the performance of their duties in bad faith, with the purpose in mind of effecting discrimination against the colored teachers *as a group.*

The fallacy of this contention is at once apparent. The members of the committee testified that in their professional opinion white teachers in Dade County, Florida, as a group were and still are, to a more limited extent, possessed of qualities which occasion them to be more effective in the classroom and consequently of greater value to the school system.

They narrated in detail the basis for their opinion (R. 136-139, 168, 211, 308 and 310). Not one word of testimony was adduced to the contrary. Thus the basis of their opinion is established as a fact, insofar as this case is concerned.

Can it be soundly argued that the realization and acceptance of a fact constitute prejudice?

Even if the individual members of the rating committee held mistaken opinions as to the respective values of the two groups, would their erroneous view preclude them from fairly and capably evaluating the respective abilities of the individual teachers in accordance with the explicit provisions of the schedule? Their task was not to measure or evaluate the groups but only to rate each teacher on specific factors.

At this point we demonstrate that Appendices II and III attached to the brief of petitioner are of no value in determining the question of discrimination:

Plaintiff's Appendix II, which includes the school year 1941-1942 only, is of no value in determining whether the schedule, as amended, has been properly applied because:

(1) The white teachers were under contract for the school 1941-1942, and this made it impossible to place the schedule into effect as to white teachers during that school year in cases where it would result in reducing salaries.. The resolution of the Board that no salaries be reduced in 1941-1942 (Defendants' Exhibit II) afforded the same treatment to colored teachers as was afforded to white teachers by their contract, i.e., no salaries of white or colored teachers could be reduced in the school year 1941-1942. So, it is apparent that the payment of salaries under the salary schedule could not be placed in effect during the school year 1941-1942

in all cases where it would result in reducing salaries, and could not become effective until the school year 1942-1943.

(2) Petitioner's Exhibit I shows 970 white degree teachers while petitioner's Appendix II shows only 805 white degree teachers or a loss of 165 teachers. Did these teachers resign rather than accept a reduction in salary or would their names if placed on Appendix II show facts that petitioner does not want to show to the Court?

Attention is directed to the fact that at the beginning of the school year 1942-1943 the salary schedule was placed in effect and salaries paid thereunder according to the ratings received by each teacher.

Plaintiffs' Appendix III does not reveal the actual operation and effect of the application of the salary schedule for (1) it does not give the correct amount of salary received by each teacher for the school year 1943-1944, as shown on Plaintiffs' Exhibit I; (2) except as to a few teachers, no reference is made to the rating received by each teacher. The salary of a teacher is determined by: (a) her rating, which places her in one of four classifications, i.e. "fair", "good", "very good" and "excellent". Each classification has a salary range as follows:

	Minimum	Maximum
Fair	720	1080
Good	1080	1260
Very Good	1260	1800
Excellent	1800	2040

(b) whether she had a Master's Degree or taught library, physical education, etc., (c) her years of service, except that at the beginning of the school year 1942-1943 all first year teachers for 1941-1942 and all first year teachers for 1942-

1943 were treated as first year teachers and rated and paid accordingly. For 1943-1944 all first year teachers were rated as such and paid accordingly; (3) it does not tell the story about a number of white teachers who resigned in 1942-1943 rather than accept a rating that resulted in a decrease in salary. It does not show the large number of white teachers, (other than beginners) and the small number of negro teachers who resigned in the school years 1942-1943 and 1943-1944 after the schedule, as amended, became effective. The appendix only shows some of the white and colored teachers who remained in the system and makes no mention of those who resigned; and (4) Petitioner's Exhibit I shows 970 white degree teachers and 154 colored degree teachers. Petitioner's Appendix III, however, shows 555 white degree teachers and 114 colored degree teachers or a loss of 415 white and 40 colored degree teachers. The question naturally arises: why are these teachers not shown? Without this information the appendix cannot give a complete picture of the application of the salary schedule as amended.

Under Item (6) the petitioner claims the additional defenses showed that the defendants were prejudiced against the colored teachers and principals.

Petitioner's counsel express amazement at the following statement of the Circuit Court of Appeals with reference to these defenses:

> "These defenses were not tried out. No evidence was offered to support them. The evidence is that no defenses were in fact made for any such reason; and that indeed there was an oversupply of white teachers".

They state that both courts below failed to use common sense in that the decree entered and approved was not affected by the additional defenses which they say "plainly

indicated - - that even before rating the defendants intended to have the result of that rating show a substantial differential in salaries in favor of the whites".

This well typifies the mental processes of petitioner's counsel through the long period of this litigation. To our minds, it clearly shows where lies the only prejudice in this cause.

Certainly the fact of defendants having interposed inconsistent defenses could not assist the plaintiff to maintain the burden of proof. Nor could the allegations contained in said defenses affect the only reason advanced by petitioner for the issuance of a writ, i.e., that the courts below "chose to consider that this (plaintiff's) prima facie case was rebutted solely by the general assertions of public officials of conscientious and non-discriminatory performance of their duties" (Pet. 11).

Petitioner claims that while the additional defenses *were not tried* "that the sole—or at least the paramount—thought in their minds (defendants) was: the whites must be paid substantially more than the blacks".

The obvious answer, of course, is that the additional defenses were not tried and that the testimony on behalf of defendants disapproved said defenses.

The petitioner confuses the alleged evil intention of the defendants with the result of the work of the rating committee. Even if it is assumed that the evidence established that the Board actually intended to arrive at the result of paying white teachers more than colored teachers, such would not suffice for there must be discrimination in fact. Thomas vs. State of Texas, 212 U.S. 278, 53 L. Ed 517. The record

establishes that the Board adopted a schedule which was fair on its face. Further the evidence is conclusive to the effect that the Board did not influence the rating under the schedule but that this work was performed solely by the rating committee.

Thus the intention of the Board can be of no consequence for the rating was done by the rating committee composed of highly trained professional people who performed their task fairly and uniformly and without favor to white or colored teachers (R. 165, 167, 174, 181, 182, 236, 271).

CONCLUSION

No contention has ever been made by defendants that the ratings and resultant classifications under the new schedule, were free from errors, or that there existed no inequalities in the salaries paid. Such admittedly was not the case and unquestionably there were inaccuracies and instances of individual discriminations. Such in fact was the testimony (R. 174, 201, 227).

However, we do most earnestly insist that such inequalities as may actually have existed—no individual instance is disclosed by the record—are no more numerous among the group composed of colored teachers than among the white group. Such inaccuracies resulted from mere human errors by the rating committee (R. 391) honestly committed, and would not have supported petitioner's claim of discrimination even had they been established. Sunday Lake Iron Co. vs. Township of Wakefield, 247 U.S. 350, 62 L. Ed. 1154, 1156, Smith vs. Witherow, 102 F. (2d) 638, 642 (3rd CCA) and cases cited.

It was established as an uncontroverted fact that the rating committee considered every teacher individually and uniformly set the salary schedule to work (R. 167, 174, 236, 271). The rating was done uniformly (R. 181, 182). Such lack of abstract symmetry as may have existed, therefore, does not matter. Patsone vs. Commonwealth of Penn., 232 U.S. 138, 58 L. Ed. 539, 543.

The testimony (R. 201) as well as the official steps taken by the Board in an effort to perfect the schedule, demonstrate that it has been the purpose of the defendants to perfect a system which would scientifically measure the teacher worth of every individual teacher without regard to race or color. The record conclusively shows that it has been and is the policy of the Board to apply the new schedule to all teachers alike, white and colored, and to rectify any inequalities that may exist. The Board has made a diligent and, we believe, successful effort to that end. The answer to petitioner's contentions is that the law requires no more. Buck vs. Bell, 274 U.S. 200, 71 L. Ed. 1000, 1002 and Wakefield case supra.

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for a writ of certiorari should be denied.

Dated September 5, 1945.

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